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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

A. The Petition seriously misrepresents the factual basis of this claim.

The Petitioner Warden's Statement of the Case provides a gross and selective misrepresentation of the evidence, both at trial and on post-conviction, upon which this claim was properly decided. The omissions foster a misleading representation of the acts and omissions of counsel and completely ignore an honest characterization of the 'expert' Dr. Lennon. Respondent Stevens provides the following additional facts of record that properly constitute the Statement of the Case.

B. Facts from the record about Dr. Lennon and facts about trial counsels' selections and use of Dr. Lennon that are omitted from the Petition.

Prior to trial counsels' mitigation specialist, Carol Knoy, spoke with Stevens about the homicide. Knoy came away from the interview with the impression that Stevens was "talking about somebody else." She relayed her impressions to his trial attorneys. [PCR R. 1405]. Counsels also became aware prior to trial that Stevens disclosed "in pretty gory detail" that he had been raped at the age of ten. [PCR R. 1401, 2501]. Stevens explained his physical and emotional pain and how when he molested and killed Zachary, he felt like he was Zachary. [PCR R. 1402] "He had put himself in Zachary's place, and he was doing to Zachary what he wished the man who raped him would have done to him[,] and that is kill him." [PCR R.1402].

Additionally, Stevens' attorneys became aware of his extensive substance use. [PCR R. 1400] Treatment records obtained from the Katherine Hamilton Center contained multiple references to drug and alcohol abuse. [Trial R. 5136-5196].

Trial counsels believed that their client's mental condition *would* be an issue at trial, [PCR R.2499], in both the culpability and penalty phases of trial, [PCR R. 2500]. Counsels'

contact with Stevens led them to believe he was mentally disturbed and that a mental health evaluation was necessary. [PCR R.2070, 2499]. The trial court granted funding for a mental health expert. The services of Dr. Lennon were secured by counsels.

Petitioner's Statement of Facts asserts that Dr. Lennon was qualified for the mitigation task. Glaringly omitted from Petitioner's account is Dr. Lennon's statement to lead counsel Baldwin that he disagreed with the medical model of mental illness embodied in the American Psychiatric Association's *Diagnostical and Statistical Manual* (hereinafter *DSM*). [PCR R. 2504-2505, 2534, 2561] Dr. Lennon subscribed instead to the "myth of mental illness," a theory rejected by mainstream mental health practitioners. The "myth," formulated by Thomas Szasz in the early 1970's in response to the *DSM-I*, posits that *mental illness does not exist and that free will governs all conduct.* [PCR R. 2014-2015]. As the concurring opinion by Seventh Circuit Judge Ripple noted, Dr. Lennon's ideas concerning mental illness were "completely abandoned" by the American Psychiatric Association in the 1980's and that "anyone who subscribes to the 'myth of mental illness' is not really in the mainstream of current thought among professionals." (App. 34A). Petitioner Warden, excluding any reference to these facts, argues that the Seventh Circuit's analysis cannot be sustained because there is no "clearly established authority" to "support the novel assertion that counsel must not rely on the professional opinions of *properly licensed and credentialed experts.*" Pet.19.

Dr. Lennon's practice focused on family therapy, child bonding, and attachment problems. [Trial R. 5280-5281] Dr. Lennon told counsel about his own personally developed hug therapy for children suffering from attachment problems. [PCR R. 2567] Mr. Baldwin found that therapy "hard to swallow," and thought it went "along with [Dr. Lennon] not believing in mental health disease when every other expert that [he] knew of does." [PCR R.

2561-2562]. One of these 'hard to swallow' theories was Dr. Lennon's "hug therapy, putting 18-year-olds on his lap and sticking a bottle in their mouth." [PCR R.2562]. During trial, Dr. Lennon testified at length about his bonding and trust therapy. [*See gen.* Trial R. 52300-5305]. Dr. Lennon testified at trial as to how a non-bonded child might become resistant and defy a parent's will, such as refusing to take out the garbage. [Trial R. 5292-5294] He detailed at trial how his unique therapy works:

> And what that involves is if a youngster is not responding to usual therapeutic intervention with the parental permission, we will take a child who is very defiant or very violent, and we'll say to the child, "now, what we're going to do is we're going to have you lie across our laps." And we'll have pillows there. We're very careful to make sure we have pillows there, and there's a pillow on top of the child, too, so there's no accidental touches the child can construe as being sexual. [Trial R. 5299-5300]

Dr. Lennon approached Stevens' case with anger and nausea. [Trial R. 5314].

He was instructed by Stevens' counsels not to draft a report until he completed his evaluation and discussed the matter with them. [PCR R. 2074, 2094, 2506, 2560]. Contrary to these instructions, Dr. Lennon wrote a report on July 18, 1994.[1] The report contained no

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[1] The Seventh Circuit majority mitigation phase decision discusses in detail trial counsels' alert to Lennon's general tenor through his report and the inappropriateness of them turning over a copy to the prosecution.

"[g]iven the fact that defense counsel did know what Dr. Lennon had written in his report, we cannot imagine what they hoped to gain by calling Dr. Lennon to the witness stand at sentencing. This decision was the catalyst for their action in turning over Dr. Lennon's extremely detrimental written report to prosecutors prior to trial. The Indiana Supreme Court indicated that this fact did not constitute an indication of deficient performance since the trial court had required "any reports from experts" to be turned over to the State prior to trial. Stevens v. Indiana, 770 N.E.2d 739, 748 n.4 (Ind. 2002). Our review of the record reveals, however, that the trial court's order pertained only to reports from expert trial witnesses retained by the defense. Stevens's lawyers could have designated Dr. Lennon as a trial consultant rather than an expert witness, thereby shielding his written report from the prosecution. See Indiana Trial Rule 26(B)(4)(b)....." App. 23A-24A.

diagnosis and detailed no test results beyond Stevens' I.Q. score. Believing all actions a matter of free will, Dr. Lennon wrote that Stevens posed a serious future danger to society and was unremorseful about Zachary's death. He posited that Stevens killed Zachary as a result of his 'free choice' and to avoid going to prison. Dr. Lennon wrote nothing about Stevens' substance abuse or LSD use shortly before the homicide, facts about which he had been informed. [PCR R. 1887, 2013-14, 2030] Dr. Lennon failed to account for Stevens' memory lapses of which he was also aware, [PCR R. 2013], or even mention his rape at age ten. [Trial R. 5358-61]. Petitioner Warden argues that the Seventh Circuit's addressing these concerns amounts to new law obligating counsel "not just to investigate Stevens' mental health and history, but to go even further and deconstruct their own expert's evaluation, presumably with additional experts." Pet.19. Petitioner Warden has omitted critical facts that undermine that absurd assertion.

Prior to trial, lead counsel Baldwin thought Dr. Lennon missed Stevens' diagnosable mental illnesses and was unqualified to assess the import of Stevens' substance abuse, suicide attempts, depression, and sexual behavior. [PCR R. 2557-2559, 2568]. Baldwin acknowledged there *was* a need for additional mental health experts, [PCR R. 2511], testifying at post-conviction that "I would have preferred to have someone other than Lennon because I believe his area of expertise is somewhat limited" even in the mental health field [PCR 2557-2558]. Contrary to Petitioner's argument, Counsel himself admitted there was *no strategic reason* for not seeking funds for another mental health expert. [PCR R. 2511]. No request for additional funds was ever made in the months leading up to trial.

Realizing *prior* to trial, that Lennon, who did not believe in mental illness, could not confirm their belief that their client suffered from a variety of mental disorders, [PCR R. 2568], Counsel, without a mental health diagnosis, decided to defend the case on a voluntary

manslaughter defense. [PCR R. 2511-2512]. Petitioner's suggestion that this was occasioned because Dr. Lennon's opinion did not support an insanity defense is misleading and taken out of context. (Pet.7). There was nothing investigated or discussed by counsels in relation to trying the case based upon either an insanity or a guilty but mentally ill defense, both of which are viable under Indiana law.

In fact, trial counsel Clutter did not articulate a case theory in his opening statement. [Trial R. 3656-3659]. Clutter acknowledged that their 'manslaughter' defense theory was a defense that did *not* go to Stevens "intent" at the time of the homicide. [PCR R. 2080] In other words, the failure to even secure a psychological evaluation and diagnosis led to a rejection of all available mental state defenses [PCR R. 2466-2467, 2513], in favor of a defense theory--voluntary manslaughter--that conceded formation of an intent to kill. [PCR R 2080]. See Ind.Code 35-42-1-3.

No defense witnesses were presented in the guilt phase. The trial court refused to instruct on voluntary manslaughter. [Trial R. 4345-4348] Baldwin nonetheless asked the jury to return a voluntary manslaughter verdict. [Trial R. 4380-4381, 4388]. The jury found Stevens guilty as charged.

Significantly, Petitioner fails to note that on direct appeal, the Indiana Supreme Court ruled that the trial court properly denied giving a voluntary manslaughter defense as it was unsupported by *any* facts at trial or under *any* theory of Indiana law. App. 251A-254A. That ruling is the law of this case, never having been challenged by either the Petitioner Warden or Respondent Stevens in any subsequent litigation.

In sentencing Stevens to death, the trial court adopted Lennon's language verbatim as well as his skewed view of Stevens finding that "[t]he defendant was shown to have free will and

free choice and was motivated to protect himself" [Trial R 5648].

Finally, although Petitioner argues that Stevens was not entitled to additional experts at public expense, Pet.19, *Ake v. Oklahoma*, 470 U.S. 68, 79-80 (1985), has long held a defendant is entitled to a competent expert.

C. Evidence was presented during State post-conviction proceedings that had counsels secured an expert who adhered to mainstream theories within the psychological and psychiatric communities the expert would have presented evidence establishing a severe dissociative disorder that would have supported a mental illness defense at mitigation.

During State post-conviction "mainstream" experts testified to their independent diagnoses that Stevens' suffered a severe dissociative mental illness and that the mental illness spoke directly to the issue of Steven's 'free will' at the time of the homicide.

Stevens was evaluated by Dr. Robert Kaplan, a board certified psychologist with expertise in trauma, substance abuse, and depression, [PCR R. 1979, 1989]; Dr. Phillip Coons, a board certified psychiatrist with expertise in dissociative disorders, [PCR R 1860, 1866], and Diane Burks, an expert licensed clinical social worker. [PCR R. 1485, 1494-1497] Each employed methodologies generally accepted within the psychiatric and psychological communities. [PCR R. 1499, 1872, 1993] Each doctor independently diagnosed Stevens as suffering from the *DSM-IV* Axis 1 major psychiatric disorders of dissociative disorder, major depression, substance abuse, and alcohol abuse; Axis 2 personality disorder of borderline personality disorder; and Axis 4 psychosocial stressors including physical and sexual abuse, neglect, and abandonment; and Axis 5 reduced global functioning. [PCR R. 1499, 1587, 1873-1875, 1995]

Drs. Coons and Kaplan opined that Stevens' mental diseases and defects manifested themselves during the homicide by dissociation and identification with Zachary Snider. [PCR R.

1887, 2001, 2004] Both opined that his mental illnesses, chronic substance abuse, and LSD use shortly before the homicide caused him to labor under an extreme mental or emotional disturbance at the time of the killing, impaired his ability to conform his conduct to the law and impaired his ability to appreciate the wrongfulness of his conduct. [PCR R. 1887-1888, 1891-1892, 2000-2004]

Dr. Kaplan, Dr. Coons, and Ms. Burks explained that Stevens' ability to make choices was impaired throughout his life. [PCR R 2027]. Had defense counsel consulted *any* readily available expert functioning within the mainstream of psychiatry and psychology, counsel would have learned that Stevens suffered from psychiatric disorders bearing a direct nexus to the commission of this offense [PCR R. 1885, 1887, 2001, 2004].

Dr. Kaplan testified that Stevens did not choose to have his dissociative disorder any more than someone would choose to have cancer. [PCR R.2028]. Dr. Coons testified that Stevens had "a very severe dissociative disorder." [PCR R. 1892, 2005]. Dr. Kaplan concluded that at the time of the killing Stevens' capacity to make personal choices "was nil" due to the influences of LSD, dissociative disorder, and borderline personality "all coming into play at the same time." [PCR R. 2029]. Dr. Kaplan testified that Stevens' mental disabilities "certainly caused the murder to occur." [PCR R.2022]. "Had he not dissociated . . . he could have prevented himself from committing the murder, and if he wasn't so impulsive by nature due to his borderline personality disorder, he would have been able to have more control over his actions, as well." [PCR R.2022]. Dr. Kaplan testified that "[t]he part of him that's able to appreciate the wrongfulness of his conduct was disengaged when he was dissociating." [PCR R. 2004]. Stevens had no way to utilize any judgment under those circumstances. [PCR R. 2003]. When asked "whether this killing was a deliberate and planned act," Dr. Kaplan testified that

> "It wasn't. It was done on the spur of the moment. It was impulsively done. It was done without any ability to realize the nature of what he was doing in terms of the wrongfulness of it, and it also occurred [] without the ability to restrain himself because all those things were disengaged by the fear and the survival instinct."

[PCR R.2023-2024].

These diagnoses were also concurred in by Diane Burks, a clinical therapist and expert in clinical social work and family therapy, who testified that denial and dissociation are the most frequent mechanism developed by abused children and that Stevens, as diagnosed, suffered many psychiatric illnesses associated with abused children in a severe form. [PCR. 1556, 1587-888]. The State presented no evidence refuting these expert opinions.

Each expert noted that the combination of dissociative disorder, borderline personality disorder, substance abuse, and depression, occur among persons subjected to childhood neglect, sexual and / or physical abuse. [PCR R. 1503-1504, 1588, 1989, 1996].[2] Stevens experienced childhood trauma, neglect, and abuse in his unstable, alcoholic, drug-infested, chaotic, sexually and physically violent family that resulted in a confused personal and sexual identity and the development of psychiatric disorders. [PCR R. 1504, 1556, 1561-62, 1886]. Stevens' school records also documented the mental isolation from one's surroundings characteristic of the dissociative. [PCR R. 1995-96]. Dr. Kaplan took issue with Dr. Lennon's approach that actions

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[2] Dr. Kaplan reviewed Dr. Lennon's records and found that even his test results clearly documented Stevens' dissociative disorder. [PCR R 1983]. However, as noted, Dr. Lennon did not recognize the mental health diagnosis as such. These results included MMPI results that revealed a pattern typical of dissociative, post-traumatic stress, and borderline personality disorders. [PCR R. 1880-1881, 2007-08]. Dr. Lennon's notes also reflected that Stevens deteriorated under stress and when confronted by intense emotions. Due to Dr. Lennon's rejection of mental illness, he was unable to recognize Stevens' deterioration as indicative of dissociation. [PCR R. 2007, 2013, 2015]. Dr. Lennon dismissed Stevens' inability to remember the killing as meaningless, [PCR R. 2013], and utterly failed to factor in the rape he suffered at age ten -- roughly the age at which Stevens' moral development was arrested. [PCR R. 2004, 2007].

reflect free will and choice, [PCR R. 2015], since one does not choose to have a dissociative disorder.

Dr. Kaplan testified that dissociative episodes are triggered by overwhelming emotional stressors that cause detachment of thought, emotion, and behavior. [PCR R. 1998, 2003] The dissociative's perception of reality changes as he loses the ability to reason, control his behavior, and remember what actions were taken. [PCR R. 1999-2000] The non-consensual sexual activity with Zachary and Zachary's threat to report were emotionally stressful events which produced two responses in Stevens: (1) an intense feeling of fright as he relived his own forcible rape and (2) an irrational belief that Zachary was the abuser and victimizer in their relationship. [PCR R. 2001, 2003, 2029, 2047] Stevens lost the ability to rationally analyze the situation and respond appropriately. [PCR R. 2003, 2023]

The inability to reason caused by dissociation was compounded by the recent use of LSD as well as Stevens' borderline personality disorder, which caused him to react impulsively. [R 2000]. In Dr. Kaplan's expert opinion, the stress of the molest and Zachary's threat caused Stevens to actively dissociate. Due to the dissociation, Stevens acted upon his emotions, did not understand what he was doing and could not conform his behavior to the law. [PCR R. 2000, 2003, 2022]. Evidence of Stevens' dissociation during the homicide is not negated by the efforts he made subsequently to cover up the offense.

Dr. Coons noted that Stevens' dissociative disorder was also evident in his clearly abnormal amnesia for large portions of his childhood, his childhood creation of a "getaway world," his depersonalization when sexually molested and molesting, and his development of typical co-morbid disorders of alcohol and substance abuse, depression, and borderline personality disorder. [PCR R. 1864, 1878-1879, 1883].

Finally, Petitioner Warden attempts to denigrate the unchallenged post-conviction evidence by making unsupported reference to Drs. Coons and Kaplan as "frequent expert witnesses for defendants." Pet.11. However, the evidence of record demonstrates that Dr. Lennon's test battery itself so clearly revealed the existence of a major psychiatric disease that the test results could have been used in a graduate psychology course. [PCR R. 2012, "You know, this is not, you know, speculative or theoretical. This is something that's been known for over 40 years."]

In short, had counsels secured an expert who adhered to mainstream theories within the psychological and psychiatric communities the expert would have presented evidence establishing a mental illness mitigation defense under Indiana law.

Reasons for Denying the Writ

The Seventh Circuit decision properly cited AEDPA standards and properly applied §2254(d) consistent with Supreme Court caselaw

1. The flaw in the Warden's entire petition is its bottom line argument that the deference due the State Supreme Court decision somehow precludes the granting of relief on this record. Yet, the Seventh Circuit began it own analysis by recognizing that the underlying facts of this case as "recounted in detail in the Indiana Supreme Court's decision affirming Stevens' conviction and sentence" are "entitled to a presumption of correctness." App. 4A Prior to its IAC analysis, the Circuit properly referenced the AEDPA's §2254(d)(1) and (2) deferential standards of review. App.11A. Yet, this is precisely what the Petitioner Warden repeatedly claims the Seventh Circuit *failed* to apply.

This Court has applied *Strickland* in the AEDPA context at least three times to hold that a defense attorney's failure to adequately investigate and present mitigating evidence at the

sentencing phase of a death penalty trial constitutes ineffective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 390 (2000). In each of these cases, AEDPA deference is addressed by the Court's reviewing the extent of the factual evidence in the record and giving considered discussion to the extent that the state court specifically addressed and analyzed the same evidence in relation to the arguments raised. When the state court has given thorough consideration to the evidence and addressed the arguments raised, this Court has generally 'deferred' to the state court, distinguishing between a decision that is 'erroneous' from one that is an 'unreasonable application.' *Taylor*, 529 U.S. at 388.

However, when, like the Indiana Supreme Court, the state court does not address critical factual evidence or address key arguments, this Court has no trouble granting relief under AEDPA. *See e.g., Rompilla v. Beard*, 545 U.S. 374, 388-389 (2005)("Without specifically discussing the prior case file, the[] [state courts] too found that defense counsel's efforts were enough to free them from any obligation to enquire further . . .We think this conclusion of the state court fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion."). *See also, Visciotti*, discussed *infra*.

2. As to *Strickland*'s first prong, consistent with this Court's IAC jurisprudence, the Seventh Circuit Court began by giving review to the Indiana Supreme Court's post-conviction decision, which concluded that defense counsel *had* adequately investigated Stevens's mental health through Dr. Lennon," App.19A, and that Stevens' counsels "then made a strategic decision not to present mitigation evidence related to Stevens's mental health." App.20A. Earlier in its analysis of the culpability phase IAC claim, the Seventh Circuit correctly stated that their *Strickland* review of counsel's performance was "highly deferential" and Stevens would be

required to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." App.12A. The standard was repeated in the mitigation phase. App. 21A.

In spite of all the above facts omitted from the Statement of the Case, facts which were never addressed or substantively analyzed in the state court ruling, Petitioner Warden repeatedly asserts that the Seventh Circuit imposed their own "independent[]" judgment "without analysis under section 2254(d)." Pet.13. This is belied by the Seventh Circuit's analysis that specifically addresses the state court's cursory analysis, noting, for example, that the state post-conviction court "did not, however, have anything to say about Stevens's lawyers' decision to call Dr. Lennon as a defense witness for sentencing purposes, other than to acknowledge Stevens' argument that Dr. Lennon "was a fatal [sic] witness for the defense." App. 20A

Giving heed to *Wiggins*, *Taylor* and *Rompilla*, it is significant that like Petitioner Warden's redacted recitation of facts, the state post-conviction decision is void of mentioning *any* of the uncontradicted post-conviction evidence detailing that Dr. Lennon was so outside the mainstream that he did not even believe in the existence of mental illness or that he thought discussing the need to place Stevens on his lap and place a bottle in his mouth might actually mitigate in favor of a life sentence. *See i e.*,App. 141-143A. Failing to even address that extensive factual record, the Seventh Circuit did nothing in violation of AEDPA when it considered the evidence omitted by the state court and applied *Strickland*. By completely failing to even address counsel's choice of going forward with Dr. Lennon for mitigation, the state court, like Petitioner Warden, never acknowledges that defense counsel went forward firmly believing their client was mentally ill but without having secured any psychological diagnosis.

There is nothing in the record to discount the Seventh Circuit's finding that Stevens'

lawyers' decision to forego mental health mitigation "was made without the kind of investigation into Stevens's mental health that *Strickland* calls for, even after Stevens's lawyers had concluded that Dr. Lennon was a quack." App.23A. *Wiggins, supra.* And as the Circuit took note, "it is uncontested that Stevens's lawyers knew nothing about the content of Dr. Lennon's planned testimony. The lawyers confessed at the post-conviction hearing that they were utterly in the dark about what Dr. Lennon would say when he took the stand." App.23A These facts were also ignored by the state court decision. The Circuit's conclusion that counsels' acts and omissions were objectively unreasonable "on this record," App.24A, is consistent with habeas law which mandates consideration of the totality of the evidence presented. *See e.g., Williams v. Taylor*, 529 U.S. at 397-98.

3. Petitioner Warden's argument about the Seventh Circuit's "independent" review is also belied by the Circuit's prejudice analysis. The Seventh Circuit began by again referencing the state Supreme Court's post-conviction decision that "reasoned that Stevens was not disadvantaged by his counsels' failure to develop mitigation evidence regarding his psychological state[3] because such evidence "would have been strongly contradicted by the extensive evidence of the defendant's multiple attempts to kill Zachary and then carefully to take steps to cover up the crime." App. 24A-25A. Asserting a principle that even the Petitioner Warden cannot take issue with, the Seventh Circuit acknowledged that as a legal matter "a mental illness mitigation defense to the imposition of a death sentence may be available even if an insanity defense to the murder charge is not." App.25A.

The Seventh Circuit, consistent with *Wiggins*, *Taylor* and *Rompilla*, then properly

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[3] The Indiana Supreme Court referenced this as Stevens' "impaired ability to appreciate the wrongfulness of his conduct." *See* App.155A

considers *Strickland's* prejudice prong "[o]n this record," App. 26A, analyzing evidence not reviewed by the state court decision, that "if the jury had heard mainstream expert psychological testimony of the sort presented by Dr. Coons and Dr. Kaplan" the result would have been different." App.25A. It is worth noting that the Indiana Supreme Court's post-conviction decision made merely a passing footnote reference to Dr. Coons in its analysis of culpability phase IAC discussing the insanity defense, and made no mention of Dr. Kaplan's extensive testimony at all. There is also nothing in the decision about Dr. Lennon's personal hug therapy or his belief that because mental illness is a myth, all actions are a result fo free will and choice. Telling the jury that Stevens' killed the child as a result of his free will and deliberate choice could not possibly be expected to mitigate the offense.

Nor is there any mention of uncontested facts that the Seventh Circuit noted as being significant to a finding of prejudice. For example, the Circuit noted that Lennon "gave a gift [to the prosecution] by expressing his belief in Stevens's future dangerousness- a subject that the prosecution itself is not permitted to argue as an aggravating circumstance under Indiana law[,]" App. 26A, and noted that his evidence also had a "strong impact" upon the trial judge citing specific phrases from the trial court's decision. App.26A.

4. For all the Petition's focus upon the failure of the Circuit Court to apply AEDPA deference, the Petition details where the Indiana Supreme Court made any substantive factual determinations based upon any in depth review of the extensive post-conviction record. This Petition should be denied because the Warden does not acknowledge the clearly established guiding AEDPA principles this Court has established for assessing whether record support for the state court decision is indeed fair and hence a decision entitled to 'deference' under §2254(d)(1) and (2).

In that sense, it is ironic that Petitioner Warden argues pursuant to *Woodford w. Visciotti*, 537 U.S. 19 (2002) (*per curiam*), that the Seventh Circuit panel majority "substituted its own judgment for that of the state court." Pet.18. *Visciotti*'s "unreasonable application" analysis, (focusing on *Strickland*'s prejudice prong), turned primarily on the 'misperception' by the Ninth Circuit that the California state supreme court had

> failed to "take into account" the totality of the available mitigating evidence, and "to consider" the prejudicial impact of certain of counsel's actions."

Visciotti, 537 U.S. at 25. In fact, as this Court pointed out, "[a]ll of the mitigating evidence, and all of counsel's prejudicial actions, that the Ninth Circuit specifically referred to as having been left out of account or consideration *were* in fact described in the California Supreme Court's lengthy and careful opinion." *Id.* (Emphasis added).

Visciotti supports the Seventh Circuit's analysis because, as noted above, the Indiana Supreme Court completely 'failed to take into account' both the exhaustive evidence demonstrating Dr. Lennon "to be a quack" as well as the extensive mitigation evidence of Stevens' severe dissociative psychosis and mental illness, (occasioned in part from his brutal rape as a ten year old child); evidence that might have been gathered had counsels proceeded with any "mainstream" psychologist. *Visciotti* stands for the proposition that before a state court's *Strickland* analysis should be vacated, the reviewing court should undertake a record-intensive review to assess whether the state court's own analysis *did* 'take into account' the available mitigating evidence and whether the state court *did* consider the prejudicial impact of counsel's actions. In *Visciotti*, *id.*, at 26, referencing extensive state record cites, the Court recognized that the state record clearly demonstrated the California court *had* both reviewed and given analytical attention in "a lengthy, detailed discussion" to all the critical mitigation. As

such, the federal habeas court's own assessment that the very same evidence should have yielded a different result was impermissible under the AEDPA's "unreasonably application" clause. *Compare Luna v. Cambra*, 306 F.3d 954; *amended* 311 F.3d 928 (9th Cir. 2002) (where a "postcard denial" by the California state court provided the Ninth Circuit with no findings to which to defer, the Court must conduct an independent review of the record to determine whether the state court clearly erred in its application of federal law). In rejecting Stevens' mitigation claim, the Indiana Supreme Court gave precisely a 'postcard denial.'

Visciotti therefore supports the Seventh Circuit's majority's analysis.

III. Conclusion.

There is no reason for this Court to review the Seventh Circuit's run of the mill IAC at mitigation decision. There is nothing to support Petitioner's alarmist and inaccurately grandiose contention that the Seventh Circuit's "fractured decision" (Pet.3,13), rendered a ruling "without and analysis under section 2254(d)." (Pet.3,13). Petitioner Warden admits the Circuit Court properly "cited and applied the proper standard of 28 U.S.C. §2254(d),"(Pet.13), when discussing IAC at the culpability phase; but, then complains that in the mitigation phase discussion, the Circuit "reference[d] section 2254(d)(1) or its operative "unreasonable application" standard only once. (Pet.15). This Petition is simply about the Petitioner Warden not being happy with the Circuit Court providing sentencing phase relief for one the Petitioner is quick to label a "child molester." (Pet. 3)

In providing sentencing phase relief, the Seventh Circuit Court was clearly cognizant of the AEDPA standards of review, specifically identified the proper standards and stated that those standards were being applied. The Seventh Circuit engaged in proper review of this issue consistent with the Supreme Court case precedent and determined in a manner consistent with

clearly established Supreme Court precedent that Stevens was indeed prejudiced by trial counsels' ineffective assistance at mitigation. It is axiomatic that when a court cites the law, claims to apply the law and analyzes the facts under the law, it is presumed that the court actually is following the law. "There is no principle of law better settled, than that act of a court of competent jurisdiction shall be presumed to have been rightly" applied. *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). *See also Bell v. Cone*, 543 U.S. 447, 455-56 (2005); *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 694-695 (1973) (per curiam).

For the above stated reasons, Respondent Stevens requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Seventh Circuit's decision and opinion.

The Seventh Circuit's decision creates no conflict of law nor will it in any way create any sort of confusion in this Court's jurisprudence. Neither does it provide any other reason to warrant revisiting this well and clearly-established area of the law. Therefore, Petitioner Warden's petition should be denied.

Respectfully Submitted,

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